



DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 10

[Docket No. FWS–HQ–MB–2018–0090; FF09M21200-212-FXMB1231099BPP0]

RIN 1018–BD76

Regulations Governing Take of Migratory Birds; Proposed Rule

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: On January 7, 2021, we, the U.S. Fish and Wildlife Service (we, the Service, or USFWS), published a final rule defining the scope of the Migratory Bird Treaty Act (MBTA) as it applies to conduct resulting in the injury or death of migratory birds protected by the MBTA.

We are now proposing to revoke that rule for the reasons set forth below. The effect of this proposed rule would be to return to implementing the MBTA as prohibiting incidental take and applying enforcement discretion, consistent with judicial precedent.

DATES: We request public comments on this proposed rule on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal: <http://www.regulations.gov>. In the Search box, enter FWS–HQ–MB–2018–0090, which is the docket number for this action. Then, click on the Search button. You may submit a comment by clicking on “Comment Now!” Please ensure you have located the correct document before submitting your comments.

(2) *By hard copy:* Submit by U.S. mail to: Public Comments Processing, Attn: FWS–HQ–MB–2018–0090, U.S. Fish and Wildlife Service, MS: JAO/3W, 5275 Leesburg Pike, Falls Church, VA 22041–3803.

We request that you send comments only by the methods described above. We will post all comments on <https://www.regulations.gov>. This generally means that we will post any personal information you provide us (see **Public Comments**, below, for more information).

FOR FURTHER INFORMATION CONTACT: Jerome Ford, Assistant Director, Migratory Birds, at 202–208–1050.

SUPPLEMENTARY INFORMATION:

On January 7, 2021, we published a final rule defining the scope of the MBTA (16 U.S.C. 703 et seq.) as it applies to conduct resulting in the injury or death of migratory birds protected by the MBTA (86 FR 1134) (hereafter referred to as the “January 7 rule”). The January 7 rule codified an interpretation of the MBTA set forth in a 2017 legal opinion of the Solicitor of the Department of the Interior, Solicitor’s Opinion M–37050, which concluded that the MBTA does not prohibit incidental take.

As initially published, the January 7 rule was to become effective 30 days later, on February 8, 2021. However, on February 4, 2021, USFWS submitted a final rule to the *Federal Register* correcting the January 7 rule’s effective date to March 8, 2021, to conform with its status as a “major rule” under the Congressional Review Act, which requires a minimum effective date period of 60 days, *see* 5 U.S.C. 801(a)(3) and 804(2). The final rule extending the effective date of the January 7 final rule itself became effective when it was made available for public inspection in the reading room of the Office of Federal Register on February 5, 2021 and was published in the *Federal Register* on February 9, 2021 (86 FR 8715). In that document, we also sought public comment to inform our review of the January 7 rule and to determine whether further extension of the effective date is necessary.

After further review, we decided not to extend the effective date of the January 7 rule beyond March 8. We acknowledge that the January 7 rule will remain in effect for some period of time even if it is ultimately determined, after notice and comment, that it should be revoked. But, rather than extending the effective date again, we believe that the most transparent and

efficient path forward is instead to immediately propose to revoke the January 7 rule. This proposed rule provides the public with notice of our current intent to revoke the January 7 rule's interpretation of the MBTA that it does not prohibit incidental take, subject to our final decision after consideration of public comments.

We have undertaken further review of the January 7 rule and have determined that the rule does not reflect the best reading of the MBTA's text, purpose, and history. It is also inconsistent with the majority of relevant court decisions addressing the issue, including the decision of the District Court for the Southern District of New York that expressly rejected the rationale offered in the rule. The rule's reading of the MBTA also raises serious concerns with a United States' treaty partner, and for the migratory bird resources protected by the MBTA and underlying treaties. Accordingly, we are proposing to revoke the January 7 rule.

The MBTA statutory provisions at issue in the January 7 rule have been the subject of repeated litigation and diametrically opposed opinions of the Solicitors of the Department of the Interior. The longstanding historical agency practice confirmed in the earlier Solicitor M-Opinion, M-37041, and upheld by most reviewing courts, had been that the MBTA prohibits the incidental take of migratory birds (subject to certain legal constraints). The January 7 rule reversed these several decades of past agency practice and interpreted the scope of the MBTA to exclude incidental take of migratory birds. In so doing, the January 7 rule codified Solicitor's Opinion M-37050, which itself had been vacated by the United States District Court for the Southern District of New York. This interpretation focused on the language of section 2 of the MBTA, which, in relevant part, makes it "unlawful at any time, by any means, or in any manner, to pursue, hunt, take, capture, kill" migratory birds or attempt to do the same. 16 U.S.C. 703(a). Solicitor's Opinion M-37050 and the January 7 rule argued that the prohibited terms listed in section 2 all refer to conduct directed at migratory birds, and that the broad preceding language, "by any means, or in any manner," simply covers all potential methods and means of performing

actions directed at migratory birds and does not extend coverage to actions that incidentally take or kill migratory birds.

As noted above, on August 11, 2020, a court rejected the interpretation set forth in Solicitor's Opinion M-37050 as contrary to the MBTA and vacated that opinion. *Natural Res. Def. Council v. U.S. Dep't of the Interior*, 478 F. Supp. 3d 469 (S.D.N.Y. 2020) ("NRDC"). In late January 2021, two new lawsuits were filed that challenge the January 7 rule. *Nat'l Audubon Soc'y v. U.S. Fish & Wildlife Serv.*, 1:21-cv-00448 (S.D.N.Y. filed Jan. 19, 2021); *State of New York v. U.S. Dep't of the Interior*, 1:21-cv-00452 (S.D.N.Y. filed Jan. 19, 2021). At the time the January 7 rule was published, the United States had filed a notice of appeal of the NRDC decision in the U.S. Court of Appeals for the Second Circuit. Since that time, the United States filed a stipulation to dismiss that appeal on February 25, 2021, and the Deputy Solicitor permanently withdrew M-37050 on March 8, 2021.

The District Court's decision in NRDC expressly rejected the basis for the January 7 rule's conclusion that the statute does not prohibit incidental take. In particular, the court reasoned that the plain language of the MBTA's prohibition on killing protected migratory bird species "at any time, by any means, and in any manner" shows that the MBTA prohibits incidental killing. *See* 478 F. Supp. 3d at 481. Thus, the statute is not limited to actions directed at migratory birds. After closely examining the court's holding, we are persuaded that it advances the better reading of the statute, including that the better reading of "kill" is that it also prohibits incidental killing.

The interpretation contained in the January 7 rule relies heavily on *United States v. CITGO Petroleum Corp.*, 801 F.3d 477 (5th Cir. 2015) (CITGO). The Fifth Circuit is the only Circuit Court of Appeals to expressly state that the MBTA does not prohibit incidental take. In CITGO, the Fifth Circuit held that the term "take" in the MBTA does not include incidental taking because "take" at the time the MBTA was enacted in 1918 referred in common law to "[reducing] animals, by killing or capturing, to human control" and accordingly could not apply

to accidental or incidental take. *Id.* at 489 (following *Babbitt v. Sweet Home Chapter Cmty. for a Great Or.*, 515 U.S. 687, 717 (1995) (Scalia J., dissenting) (*Sweet Home*)). While we do not agree with the *CITGO* court's interpretation of the term "take" under the MBTA, we further note that *CITGO* does not provide legal precedent for construing "kill" narrowly. The *CITGO* court's analysis is limited by its terms to addressing the meaning of the term "take" under the MBTA; thus, any analysis of the meaning of the term "kill" was not part of the court's holding. As discussed below, however, we also disagree with the *CITGO* court's analysis of the term "kill."

Although the *CITGO* court's holding was limited to interpreting "take," the court opined in dicta that the term "kill" is limited to intentional acts aimed at migratory birds in the same manner as "take." *See* 801 F.3d at 489 n.10. However, the court based this conclusion on two questionable premises.

First, the court stated that "kill" has little if any independent meaning outside of the surrounding prohibitory terms "pursue," "hunt," "capture," and "take," analogizing the list of prohibited acts to those of two other environmental statutes—the Endangered Species Act (ESA) (16 U.S.C. 1531 et seq.) and the Migratory Bird Conservation Act (16 U.S.C. 715 et seq.). *See id.* The obvious problem with this argument is that it effectively reads the term "kill" out of the statute; in other words, the *CITGO* court's reasoning renders "kill" superfluous to the other terms mentioned, thus violating the rule against surplusage. *See, e.g., Corley v. United States*, 556 U.S. 303, 314 (2009).

Second, employing the *noscitur a sociis* canon of statutory construction (which provides that the meaning of an ambiguous word should be determined by considering its context within the words it is associated with), the Fifth Circuit argued that because the surrounding terms apply to "deliberate acts that effect bird deaths," then "kill" must also. *See* 801 F.3d at 489 n.10. The January 7 rule also relied heavily on this canon to argue that both "take" and "kill" must be read as deliberate acts in concert with the other referenced terms. Upon closer inspection though, the only terms that clearly and unambiguously refer to deliberate acts are "hunt" and "pursue." Both

the *CITGO* court and the January 7 final rule erroneously determined that “capture” can also only be interpreted as a deliberate act. This is not so. There are many examples of unintentional or incidental capture, such as incidental capture in traps intended for animals other than birds or in netting designed to prevent swallows nesting under bridges. Thus, the *CITGO* court’s primary argument that “kill” only applies to “deliberate actions” rests on the fact that just two of the five prohibited actions unambiguously describe deliberate acts. The fact that most of the prohibited terms can be read to encompass actions that are not deliberate in nature is a strong indication that Congress did not intend those terms to narrowly apply only to direct actions.

The *NRDC* court similarly rejected the January 7 rule’s interpretation of the term “kill” and its meaning within the context of the list of actions prohibited by the MBTA. The court noted the broad, expansive language of section 2 prohibiting hunting, pursuit, capture, taking, and killing of migratory birds “by any means or in any manner.” 478 F. Supp. 3d at 482. The court reasoned that the plain meaning of this language can only be construed to mean that activities that result in the death of a migratory bird are a violation “irrespective of whether those activities are specifically directed at wildlife.” *Id.* The court also noted that the *Sweet Home* decision relied upon by the *CITGO* court and the January 7 rule actually counsels in favor of a broad reading of the term “kill,” even assuming Justice Scalia accurately defined the term “take” in his dissent. The *Sweet Home* case dealt specifically with the definition of “take” under the ESA, which included the terms “harm” and “kill.” The majority in *Sweet Home* was critical of the consequences of limiting liability under the ESA to “affirmative conduct intentionally directed against a particular animal or animals,” reasoning that knowledge of the consequences of an act are sufficient to infer liability, including typical incidental take scenarios. *Id.* at 481–82.

The *NRDC* court went on to criticize the use of the *noscitur a sociis* canon in Solicitor’s Opinion M–37050 (a use repeated in the January 7 rule). The court reasoned that the term “kill” is broad and can apply to both intentional, unintentional, and incidental conduct. The court faulted the Solicitor’s narrow view of the term and disagreed that the surrounding terms required

that narrow reading. To the contrary, the court found the term “kill” to be broad and not at all ambiguous, pointedly noting that proper use of the *noscitur* canon is confined to interpreting ambiguous statutory language. Moreover, use of the *noscitur* canon deprives “kill” of any independent meaning, which runs headlong into the canon against surplusage as noted above. The court did not agree that an example provided by the government demonstrated that “kill” had independent meaning from “take” under the interpretation espoused by Solicitor’s Opinion M–37050. By analogy, the court referenced the Supreme Court’s rejection of the dissent’s use of the *noscitur* canon in *Sweet Home*, which similarly gave the term “harm” the same essential function as the surrounding terms used in the definition of “take” under the ESA, denying it independent meaning. *See id.* at 484.

In sum, after further review of the *CITGO* and *NRDC* decisions, along with the language of the statute, we now conclude that the interpretation of the MBTA set forth in the January 7 rule and Solicitor’s Opinion M–37050, which provided the basis for that interpretation, is not the construction that best accords with the text, purposes, and history of the MBTA. It simply cannot be squared with the *NRDC* court’s holding that the MBTA’s plain language encompasses the incidental killing of migratory birds. Even if the *NRDC* court’s plain-language analysis were incorrect, the operative language of the MBTA is at minimum ambiguous, thus USFWS has discretion to implement that language in a manner consistent with the conservation purposes of the statute and its underlying Conventions. To the extent that the primary policy justifications for the January 7 rule were resolving uncertainty and increasing transparency through rulemaking, we do not consider these concerns to outweigh the legal infirmities of the January 7 rule or the conservation purposes of the statute and its underlying Conventions. Interpreting the statute to exclude incidental take is not the reading that best advances these purposes, which is underscored by the following additional reasons for revoking the current regulation.

First, the January 7 rule is undermined by the 2002 legislation authorizing military-readiness activities that incidentally take or kill migratory birds. In that legislation, Congress

temporarily exempted “incidental taking” caused by military-readiness activities from the prohibitions of the MBTA; required the Secretary of Defense to identify, minimize, and mitigate the adverse effect of military-readiness activities on migratory birds; and directed USFWS to issue regulations under the MBTA creating a permanent exemption for military-readiness activities. Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. 107-314, Div. A, Title III, section 315 (2002), 116 Stat. 2509 (Stump Act). This legislation was enacted in response to a court ruling that had enjoined military training that incidentally killed migratory birds. *Ctr. for Biological Diversity v. Pirie*, 191 F. Supp. 2d 161 and 201 F. Supp. 2d 113 (D.D.C. 2002), *vacated on other grounds sub nom. Ctr. for Biological Diversity v. England*, 2003 U.S. App. Lexis 1110 (D.C. Cir. Jan. 23, 2003). Notably, Congress did not amend the MBTA to define the terms “take” or “kill.” Instead, Congress itself uses the term “incidental take” and provides that the MBTA “shall not apply” to such take by the Armed Forces during “military-readiness activities.” Moreover, Congress limited the exemption only to military-readiness activities to training and operations related to combat and the testing of equipment for combat use; it expressly excluded routine military-support functions and the “operation of industrial activities” from the exemption afforded by the 2002 legislation, leaving such non-combat-related activities fully subject to the prohibitions of the Act. Even then, the military-readiness incidental take carve-out was only temporarily effectuated through the statute itself. Congress further directed the Department of the Interior (DOI or the Department) “to prescribe regulations to exempt the Armed Forces for the incidental taking of migratory birds during military readiness activities.” This would be an odd manner in which to proceed to address the issue raised by the *Pirie* case if Congress’ governing understanding at the time was that incidental take of any kind was not covered by the Act (we acknowledge that Congress’s understanding when enacting legislation in 2002 is relevant to, but not dispositive of, Congress’s intent when it enacted the MBTA in 1918). Congress simply could have amended the MBTA to clarify that incidental take is not prohibited by the statute or, at the least, that take incidental to

military-readiness activities is not prohibited. Instead, Congress limited its amendment to exempting incidental take only by military-readiness activities, expressly excluded other military activities from the exemption, and further directed DOI to issue regulations delineating the scope of the military-readiness carve-out from the prohibitions of the Act. All of these factors indicate that Congress understood that the MBTA's take and kill prohibitions included what Congress itself termed "incidental take."

In arguing that Congress's authorization of incidental take during military-readiness activities did not authorize enforcement of incidental take in other contexts, the January 7 rule cites the *CITGO* court's conclusion that a "single carve-out from the law cannot mean that the entire coverage of the MBTA was implicitly and hugely expanded." *CITGO*, 801 F.3d at 491. It is true that the Stump Act clearly did not, by its terms, authorize enforcement of incidental take in other contexts. It clearly could not do anything of the sort, based on its narrow application to military-readiness activities. Rather, the logical explanation is that Congress considered that the MBTA already prohibited incidental take (particularly given USFWS's enforcement of incidental take violations over the prior three decades) and there was no comprehensive regulatory mechanism available to authorize that take. Thus, it was necessary to temporarily exempt incidental take pursuant to military-readiness activities to address the *Pirie* case and direct USFWS to create a permanent exemption. This conclusion is supported by the fact that Congress specifically stated in the Stump Act that the exemption did not apply to certain military activities that do not meet the definition of military readiness, including operation of industrial activities and routine military-support functions.

On closer inspection, the *CITGO* court's analysis of the purposes behind enactment of the military-readiness exemption is circular. Assuming the military-readiness exemption is necessary because the MBTA otherwise prohibits incidental take only represents an implicit and huge expansion of coverage under the MBTA if it is assumed that the statute did not already prohibit incidental take up to that point. But Congress would have had no need to enact the exemption if

the MBTA did not—both on its terms and in Congress’s understanding—prohibit incidental take. The adoption of a provision to exempt incidental take in one specific instance is merely a narrowly tailored exception to the general rule, and provides clear evidence of what Congress understood the MBTA to prohibit.

Second, further consideration of concerns expressed by one of our treaty partners counsels in favor of revoking the January 7 rule. The MBTA implements four bilateral migratory bird Conventions with Canada, Mexico, Russia, and Japan. *See* 16 U.S.C. 703–705, 712. The Government of Canada communicated its concerns with the January 7 rule both during and after the rulemaking process, including providing comments on the environmental impact statement (EIS) associated with the rule.

After the public notice and comment period had closed, Canada’s Minister of Environment and Climate Change summarized the Government of Canada’s concerns in a public statement issued on December 18, 2020 (<https://www.canada.ca/en/environment-climate-change/news/2020/12/minister-wilkinson-expresses-concern-over-proposed-regulatory-changes-to-the-united-states-migratory-bird-treaty-act.html>). Minister Wilkinson voiced the Government of Canada’s concern regarding “the potential negative impacts to our shared migratory bird species” of allowing the incidental take of migratory birds under the MBTA rule and “the lack of quantitative analysis to inform the decision.” He noted that the “Government of Canada’s interpretation of the proposed changes . . . is that they are not consistent with the objectives of the Convention for the Protection of Migratory Birds in the United States and Canada.”

Additionally, in its public comments on the draft EIS for the MBTA rule, Canada stated that it believes the rule “is inconsistent with previous understandings between Canada and the United States (U.S.), and is inconsistent with the long-standing protections that have been afforded to non-targeted birds under the Convention for the Protection of Migratory Birds in the United States and Canada . . . as agreed upon by Canada and the U.S. through Article I. The removal of such protections will result in further unmitigated risks to vulnerable bird populations protected

under the Convention.” After further consideration, we have similar concerns to those of our treaty partner, Canada.

The protections for “non-targeted birds” noted by the Canadian Minister are part and parcel of the Canada Convention, as amended by the Protocol between the United States and Canada Amending the 1916 Convention for the Protection of Migratory Birds in Canada and the United States, which protects not only game birds hunted and trapped for sport and food, but also nongame birds and insectivorous birds. For instance, the preamble to the Convention declares “saving from indiscriminate slaughter and of insuring the preservation of such migratory birds as are either useful to man or are harmless” as its very purpose and declares that “many of these species are ... in danger of extermination through lack of adequate protection during the nesting season or while on their way to and from their breeding grounds.” Convention between the United States and Great Britain (on behalf of Canada) for the Protection of Migratory Birds, 39 Stat. 1702 (Aug. 16, 1916). Thus, whether one argues that the language of section 2 of the MBTA plainly prohibits incidental killing of migratory birds or is ambiguous in that regard, an interpretation that excludes incidental killing is difficult to square with the express conservation purposes of the Canada Convention. Moreover, until recently there had been a longstanding “mutually held interpretation” between the two treaty partners that regulating incidental take is consistent with the underlying Convention, as stated in an exchange of Diplomatic Notes in 2008. While Canada expressed its position before the final rule on January 7, upon review, we now have determined that the concerns raised by the United States’ treaty partner counsel in favor of revocation of the rule.

In addition to the Canada Convention, the January 7 rule may also be inconsistent with the migratory bird conventions with Mexico, Japan, and Russia. The Japan and Russia Conventions both broadly call for the parties to prevent damage to birds from pollution. *See* Convention between the Government of the United States of America and the Government of Japan for the Protection of Migratory Birds and Birds in Danger of Extinction, and Their

Environment, Mar. 4, 1972, 25 U.S.T. 3329 (Japan Convention); Convention between the United States of America and the Union of Soviet Socialist Republics Concerning the Conservation of Migratory Birds and Their Environment, Nov. 19, 1976, 29 U.S.T. 4647 (Russia Convention). The Protocols amending the Canada and Mexico Conventions contain similar language calling for the parties to seek means to prevent damage to birds and their environment from pollution. *See* Protocol between the Government of the United States and the Government of Canada Amending the 1916 Convention Between the United Kingdom and the United States of America for the Protection of Migratory Birds, Dec. 14, 1995, S. Treaty Doc. No. 104-28, T.I.A.S. 12721; Protocol Between the Government of the United States of America and the Government of the United Mexican States Amending the Convention for the Protection of Migratory Birds and Game Mammals, May 5, 1997, S. Treaty Doc. No. 105-26.

Some of the relevant provisions include Article IV of the Protocol with Canada, which states that each party shall use its authority to “take appropriate measures to preserve and enhance the environment of migratory birds,” and in particular shall “seek means to prevent damage to [migratory] birds and their environments, including damage resulting from pollution”; Article I of the Mexico Convention, which discusses protecting migratory birds by “means of adequate methods[...];” Article VI(a) of the Japan Convention, which provides that parties shall “[s]eek means to prevent damage to such birds and their environment, including, especially, damage resulting from pollution of the seas”; and Articles IV(1) and 2(c) of the Russia Convention, which require parties to “undertake measures necessary to protect and enhance the environment of migratory birds and to prevent and abate the pollution or detrimental alteration of that environment,” and, in certain special areas, undertake, to the maximum extent possible, “measures necessary to protect the ecosystems in those special areas . . . against pollution, detrimental alteration and other environmental degradation.”

The January 7 rule eliminates a source of liability for pollution that incidentally takes and kills migratory birds, a position that is difficult to square with the mutually agreed-upon treaty

provisions agreeing to prevent damage to birds from pollution. The January 7 rule does not directly affect natural resource damage assessments conducted under the Comprehensive Environmental Response Compensation and Liability Act, the Oil Pollution Act, and the Clean Water Act to determine compensation to the public for lost natural resources and their services from accidents that have environmental impacts, such as oil spills. However, for oils spills such as the BP Deepwater Horizon Gulf oil spill and the *Exxon Valdez* oil spill in Alaska, significant penalties were levied in addition to those calculated under natural resource damage assessments based on incidental-take liability under the MBTA. Those fines constituted a large proportion of the total criminal fines and civil penalties associated with historical enforcement of incidental take violations. As noted in the EIS, the January 7 rule eliminates the Federal Government's ability to levy similar fines in the future, thereby reducing the deterrent effect of the MBTA and reducing funding for the North American Wetland Conservation Fund for the protection and restoration of wetland habitat for migratory birds.

In sum, the issues raised by the Government of Canada raise significant concerns regarding whether the January 7 rule is consistent with the Canada Convention, and questions also remain regarding that rule's consistency with the other migratory bird Conventions. We note as well that the primary policy justifications for the January 7 rule were resolving uncertainty and increasing transparency through rulemaking. These concerns, however, do not outweigh the legal infirmities of the January 7 rule or the conservation objectives described above. On these bases, in addition to the legal concerns raised above, we are proposing to revoke the MBTA rule.

Public Comments

We solicit public comments on the following topics:

1. Whether we should revoke the rule, as proposed here, and why or why not;
2. The costs or benefits of revoking the rule;
3. The costs or benefits of leaving the rule in place; and

4. Any reliance interests that might be affected by revoking the rule, or not revoking the rule.

You may submit your comments and materials concerning this proposed rule by one of the methods listed in **ADDRESSES**. If you provided comments in response to the February 9, 2021, rule (86 FR 8715) to extend the effective date of the January 7 rule, you do not need to resubmit those comments in response to this proposed rule. The USFWS will consider all comments pertaining to the January 7 rule that were submitted in response to the February 9, 2021, rule in determining whether to revoke the January 7 rule. Comments must be submitted to <http://www.regulations.gov> before 11:59 p.m. (Eastern Time) on the date specified in **DATES**. We will not consider mailed comments that are not postmarked by the date specified in **DATES**.

We will post your entire comment—including your personal identifying information—on <http://www.regulations.gov>. If you provide personal identifying information in your comment, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. Comments and materials we receive will be available for public inspection on <http://www.regulations.gov>.

Required Determinations

National Environmental Policy Act

Because we are proposing to revoke the January 7 MBTA rule, we will rely on the final EIS developed to analyze that rule in determining the environmental impacts of revoking it: “Final Environmental Impact Statement; Regulations Governing Take of Migratory Birds,” available on <http://www.regulations.gov> in Docket No. FWS–HQ–MB–2018–0090. The alternatives analyzed in that EIS cover the effects of interpreting the MBTA to both include and exclude incidental take. If we finalize this proposed rule, we will publish an amended Record of Decision that explains our decision to instead select the environmentally preferable alternative, or Alternative B, in the final EIS. If we determine that any additional, relevant impacts on the

human environment have occurred subsequent to our existing Record of Decision, we will describe those impacts in the amended Record of Decision.

Government to Government Relationship with Tribes

In accordance with Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments,” and the Department of the Interior’s manual at 512 DM 2, we considered the possible effects of this rule on federally recognized Indian Tribes. The Department of the Interior strives to strengthen its government-to government relationship with Indian Tribes through a commitment to consultation with Indian Tribes and recognition of their right to self governance and Tribal sovereignty.

We have evaluated the January 7 rule that this proposed rule would revoke under the criteria in Executive Order 13175 and under the Department’s Tribal consultation policy and determined that the January 7 rule may have a substantial direct effect on federally recognized Indian Tribes. We received requests from nine federally recognized Tribes and two Tribal councils for government-to-government consultation on that rule. Accordingly, the Service initiated government to government consultation via letters signed by Regional Directors and completed the consultations before issuing the January 7 final rule.

During these consultations, there was unanimous opposition from Tribes to the re-interpretation of the MBTA to exclude coverage of incidental take under the January 7 rule. Thus, this proposal to revoke the January 7 rule is consistent with the requests of federally recognized Tribes during those consultations.

Energy Supply Distribution

E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. As noted above, this rule is a significant regulatory action under E.O. 12866, but the rule is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The action has not been otherwise designated by the Administrator of the Office of

Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) as a significant energy action. Therefore, no Statement of Energy Effects is required.

Endangered Species Act

Section 7 of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531–44), requires that “The Secretary [of the Interior] shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act.” 16 U.S.C. 1536(a)(1). It further states “[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency...is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat.” 16 U.S.C. 1536(a)(2). We have determined that this rule proposing the revocation of the January 7 rule regarding the take of migratory birds will have no effect on ESA-listed species within the meaning of ESA Section 7(a)(2).

Regulatory Planning and Review (Executive Orders 12866 and 13563)

Executive Order (E.O.) 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) will review all significant rules. OIRA has determined that this proposed rule is economically significant.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation’s regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this proposed rule in a manner consistent with these requirements.

This proposed regulation would revoke the January 7 MBTA rule. The legal effect of this proposal would be to remove from the Code of Federal Regulations (CFR) the interpretation that incidental take of migratory birds is not prohibited under the MBTA, based on the rationale explained in the preamble. As explained in the preamble, the Solicitor's Opinion (M-37050) that formed the basis for the January 7 rule was overturned in court and has since been withdrawn by the Solicitor's Office. By removing § 10.14 from subpart B of title 50 CFR, USFWS would revert to implementing the statute without an interpretative regulation governing incidental take, consistent with judicial precedent. This would mean that incidental take can violate the MBTA to the extent consistent with the statute and judicial precedent. Enforcement discretion would be applied, subject to certain legal constraints.

The Service conducted a regulatory impact analysis of the January 7 rule, which can be viewed online at <http://www.regulations.gov> in Docket No. FWS-HQ-MB-2018-0090. In that analysis, we analyzed the effects of an alternative (Alternative B) where the Service would promulgate a regulation that interprets the MBTA to prohibit incidental take consistent with the Department's longstanding prior interpretation. By reverting to this interpretation, the Service would view the incidental take of migratory birds as a potential violation of the MBTA, consistent with judicial precedent. The Regulatory Impact Analysis for this proposed rule can be viewed online at <http://www.regulations.gov> in Docket No. FWS-HQ-MB-2018-0090.

The primary benefit of this rule results from decreased incidental take. While we are unable to quantify the benefits, we expect this rule to result in increased ecosystem services and benefits to businesses that rely on these services. Further, benefits will accrue from increased bird watching opportunities. The primary cost of this rule is the compliance cost incurred by industry, which is also not quantifiable. Firms are more likely to implement best practice measures to avoid potential fines. Additionally, potential fines generate transfers from industry to the government. Using a 10-year time horizon (2022-2031), the present value of these transfers is estimated to be \$73.6 million at a 7-percent discount rate and \$67.1 million at a 3-percent discount rate. This

would equate to an annualized value of \$15.6 million at a 7-percent discount rate and \$15.3 million at a 3-percent discount rate. *Regulatory Flexibility Act and Small Business Regulatory Enforcement Fairness Act*

Under the Regulatory Flexibility Act (5 U.S.C. 601 et seq., as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 (Pub. L. 104-121)), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small businesses, small organizations, and small government jurisdictions. However, in lieu of an initial or final regulatory flexibility analysis (IRFA or FRFA) the head of an agency may certify on a factual basis that the rule would not have a significant economic impact on a substantial number of small entities.

SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule would not have a significant economic impact on a substantial number of small entities. Thus, for an initial/final regulatory flexibility analysis to be required, impacts must exceed a threshold for “significant impact” and a threshold for a “substantial number of small entities.” See 5 U.S.C. 605(b). We prepared an Initial Regulatory Flexibility Analysis, briefly summarized below, to accompany this rule that can be viewed online at <http://www.regulations.gov> in Docket No. FWS-HQ-MB-2018-0090.

The proposed rule may affect industries that typically incidentally take substantial numbers of birds and with which the Service has worked to reduce those effects (Table 1). In some cases, these industries have been subject to enforcement actions and prosecutions under the MBTA prior to the issuance of M-37050. The vast majority of entities in these sectors are small entities, based on the U.S. Small Business Administration (SBA) small business size standards. It is important to note that many small businesses would not be affected if we ultimately promulgate this proposed rule. Only those businesses that reduced best management practices that avoid or minimize incidental take of migratory birds as a result of the issuance of M-37050

in January 2017 and the January 7, 2021, rule would incur costs. If we promulgate this proposed rule, those businesses would presumably reinstate those best management practices. We are requesting public comment on the number of businesses that reduced best management practices and the resulting cost savings as a direct result of issuance of M-37050 and the January 7 rule.

TABLE 1—DISTRIBUTION OF BUSINESSES WITHIN AFFECTED INDUSTRIES

NAICS Industry Description	NAICS Code	Number of Businesses	Small Business Size Standard (number of employees)	Number of Small Businesses
Finfish Fishing	114111	1,210	20 ^(a)	1,185
Crude Petroleum and Natural Gas Extraction	211111	6,878	1,250	6868
Drilling Oil and Gas Wells	213111	2,097	1,000	2092
Solar Electric Power Generation	221114	153	250	153
Wind Electric Power Generation	221115	264	250	263
Electric Bulk Power Transmission	221121	261	500	214
Electric Power Distribution	221122	7,557	1,000	7520
Wireless Telecommunications Carriers (except Satellite)	517312	15,845	1,500	15831

Source: U.S. Census Bureau, 2012 County Business Patterns.

^aNote: The SBA size standard for finfish fishing is \$22 million. Neither Economic Census, Agriculture Census, nor the National Marine Fisheries Service collect business data by revenue size for the finfish industry. Therefore, we employ other data to approximate the number of small businesses. Source: U.S. Census Bureau, 2017 Economic Annual Survey.

Since the Service does not currently have a permitting system dedicated to authorizing incidental take of migratory birds, the Service does not have specific information regarding how many businesses in each sector implement measures to reduce incidental take of birds. Not all businesses in each sector incidentally take birds. In addition, a variety of factors would influence whether, under the previous interpretation of the MBTA, businesses would implement such measures. It is also unknown how many businesses continued or reduced practices to reduce the incidental take of birds since publication of the Solicitor's Opinion M-37050 or issuance of the January 7 rule. We did not receive sufficient information on that issue during the public comment periods associated with the January 7 rule and associated NEPA analysis or the

February 9 rule extending the effective date of the January 7 rule. We reiterate our request for public comment on these issues for this proposed rule.

If this proposed rulemaking results in revoking the January 7 rule, any subsequent incidental take of migratory birds could violate the MBTA, consistent with the statute and judicial precedent. Some small entities would incur costs if they reduced best management practices after M-Opinion 37050 was issued in January 2017 or after promulgation of the January 7, 2021, rule and would need to subsequently reinstate those practices if the January 7 rule is revoked, assuming they did not already reinstate such practices after vacatur of M-Opinion 37050.

Summary

Table 2 identifies examples of bird mitigation measures, their associated costs, and why available data are not extrapolated to the entire industry sector or small businesses. We are requesting public comment so we can extrapolate data, if appropriate, to each industry sector and any affected small businesses. Table 3 summarizes likely economic effects of the proposed rule on the business sectors identified in Table 1. In many cases, the costs of actions businesses typically implement to reduce effects on birds are small compared to the economic output of business, including small businesses, in these sectors. We are requesting public comment regarding this estimate. As shown by the limited data in Table 3, we are also requesting public comment for the finfish fishing and solar power electric generation industries to determine significance. The likely economic effects summarized in Table 3 are based on the RFA analysis for the January 7 rule. We solicited public comments on these issues during the public comment periods associated with the January 7 rule and associated NEPA analysis and the February 9 rule extending the effective date of the January 7 rule. We reiterate our request for public comment on these data for this proposed rule.

TABLE 2—BEST MANAGEMENT PRACTICES COSTS BY INDUSTRY¹

NAICS Industry	Example of Bird Mitigation Measure	Estimated Cost	Why data are not extrapolated to entire
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			industry or small businesses
Finfish Fishing (NAICS 11411)	Changes in design of longline fishing hooks, changes in offal management practices, use of flagging or streamers on fishing lines	<ul style="list-style-type: none"> Costs are per vessel per year \$1,400 for thawed blue-dyed bait \$150 for strategic offal discards \$4,600 for Tori line \$4,000 one-time cost for underwater setting chute \$4,000 initial and \$50 annual for side setting 	<ul style="list-style-type: none"> No data available on fleet size No data available on how many measures are employed on each vessel
Crude Petroleum and Natural Gas Extraction NAICS (211111)	<ul style="list-style-type: none"> Netting of oil pits and ponds Closed wastewater systems 	<ul style="list-style-type: none"> \$130,680 to \$174,240 per acre to net ponds Most netted pits are ¼ to ½ acre Cost not available for wastewater systems 	<ul style="list-style-type: none"> Infeasible to net pits larger than 1 acre due to sagging Size distribution of oil pits is unknown Average number of pits per business is unknown Closed wastewater systems typically used for reasons other than bird mitigation
Drilling Oil and Gas Wells (NAICS 213111)	<ul style="list-style-type: none"> Netting of oil pits and ponds Closed loop drilling fluid systems 	<ul style="list-style-type: none"> \$130,680 to \$174,240 per acre to net ponds Cost not available for closed loop drilling fluid systems, but may be a net cost savings in arid areas with water conservation requirements 	<ul style="list-style-type: none"> Infeasible to net pits larger than 1 acre due to sagging Size distribution of oil pits is unknown Average number of pits per business is unknown Closed loop drilling fluid systems typically used for reasons other than bird mitigation High variability in number of wells drilled per year (21,200 in 2019)
Solar Electric Power Generation (NAICS 221114)	Pre- and post-construction bird surveys	No public comments received on January 7 rule to estimate costs	New projects can vary from 100 to 5,000 acres in size, and mortality surveys may not scale linearly

Wind Electric Power Generation (NAICS 221115)	<ul style="list-style-type: none"> • Pre-construction adjustment of turbine locations to minimize bird mortality during operations • Pre- and post-construction bird surveys • Retrofit power poles to minimize eagle mortality 	<ul style="list-style-type: none"> • Cost not available for adjustment of turbine construction locations • \$100,000 to \$500,000 per facility per year for pre-construction site use and post-construction bird mortality surveys • \$7,500 per power pole with high variability of cost • Annual nationwide labor cost to implement wind energy guidelines: \$17.6M • Annual nationwide non-labor cost to implement wind energy guidelines: \$36.9M 	<ul style="list-style-type: none"> • Data not available for adjustment of turbine construction locations • High variability in survey costs and high variability in need to conduct surveys • High variability in cost and need to retrofit power poles
Electric Bulk Power Transmission (NAICS 221121)	Retrofit power poles to minimize eagle mortality	\$7,500 per power pole with high variability of cost	High variability in cost and need to retrofit power poles
Electric Power Distribution (NAICS 221122)	Retrofit power poles to minimize eagle mortality	\$7,500 per power pole with high variability of cost	High variability in cost and need to retrofit power poles
Wireless Telecommunications Carriers (except Satellite) (NAICS 517312)	<ul style="list-style-type: none"> • Extinguish non-flashing lights on towers taller than 350' • Retrofit towers shorter than 350' with LED flashing lights 	<ul style="list-style-type: none"> • Industry saves hundreds of dollars per year in electricity costs by extinguishing lights • Retrofitting with LED lights requires initial cost outlay, which is recouped over time due to lower energy costs and reduced maintenance 	Data not available for number of operators who have implemented these practices

¹Sources: FWS personnel, National Oceanic and Atmospheric Administration Revised Seabird Regulations Amendment, eccnetting.com, statista.com, aerion.com, FWS Wind Energy Guidelines, FWS Public Records Act data, FWS Eagle Conservation Plan Guidance.

TABLE 3—SUMMARY OF ECONOMIC EFFECTS ON SMALL BUSINESSES

NAICS Industry Description (NAICS Code)	Potential bird mitigation measures under this proposed rule	Economic effects on small businesses	Rationale
Finfish Fishing (11411)	Changes in design of longline fishing hooks, changes in	Likely minimal effects	Seabirds are specifically excluded from the definition of bycatch under the Magnuson-Stevens Fishery

	offal management practices, and flagging/streamers on fishing lines		Conservation and Management Act and, therefore, seabirds not listed under the ESA may not be covered by any mitigation measures. The impact of this on small entities is unknown.
Crude Petroleum and Natural Gas Extraction (21111)	Using closed waste-water systems or netting of oil pits and ponds	Likely minimal effects	Thirteen States have regulations governing the treatment of oil pits such as netting or screening of reserve pits, including measures beneficial to birds. In addition, much of the industry is increasingly using closed systems, which do not pose a risk to birds. For these reasons, this proposed rule is unlikely to affect a significant number of small entities.
Drilling Oil and Gas Wells (21311)	Using closed waste-water systems or netting of oil pits and ponds	Likely minimal effects	Thirteen States have regulations governing the treatment of oil pits, such as netting or screening of reserve pits, including measures beneficial to birds. In addition, much of the industry is increasingly using closed systems, which do not pose a risk to birds. For these reasons, this proposed rule is unlikely to affect a significant number of small entities.
Solar Electric Power Generation (22114)	Monitoring bird use and mortality at facilities, limited use of deterrent systems such as streamers and reflectors	Likely minimal effects	Bird monitoring in some States may continue to be required under State policies. The number of States and the policy details are unknown.
Wind Electric Power Generation (22115)	Following Wind Energy Guidelines, which involve conducting risk assessments for siting facilities	Likely minimal effects	Following the Wind Energy Guidelines has become industry best practice and would likely continue. In addition, the industry uses these guidelines to aid in reducing effects on other regulated species like eagles and threatened and endangered bats.
Electric Bulk Power Transmission (22121)	Following Avian Power Line Interaction Committee (APLIC) guidelines	Likely minimal effects	Industry would likely continue to use APLIC guidelines to reduce outages caused by birds and to reduce the take of eagles, regulated under the Bald and Golden Eagle Protection Act.
Electric Power Distribution (22122)	Following Avian Power Line Interaction Committee (APLIC) guidelines	Likely minimal effects	Industry would likely continue to use APLIC guidelines to reduce outages caused by birds and to reduce the take of eagles, regulated under the Bald and Golden Eagle Protection Act.

Wireless Tele-communications Carriers (except Satellite) (517312)	Installation of flashing obstruction lighting	Likely minimal effects	Industry will likely continue to install flashing obstruction lighting to save energy costs and to comply with recent Federal Aviation Administration Lighting Circular and Federal Communication Commission regulations.
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While the Service concludes that certification is likely appropriate in this case, and consistent with our analysis of economic impacts under the January 7 rule, we have developed an IRFA out of an abundance of caution to ensure that economic impacts on small entities are fully accounted for in this rulemaking process.

Unfunded Mandates Reform Act

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we have determined the following:

a. This proposed rule would not “significantly or uniquely” affect small government activities. A small government agency plan is not required.

b. This proposed rule would not produce a Federal mandate on local or State government or private entities. Therefore, this proposed action is not a “significant regulatory action” under the Unfunded Mandates Reform Act.

Takings

In accordance with E.O. 12630, this proposed rule does not contain a provision for taking of private property, and would not have significant takings implications. A takings implication assessment is not required.

Federalism

This proposed rule will not create substantial direct effects or compliance costs on State and local governments or preempt State law. Some States may choose not to enact changes in their management efforts and regulatory processes and staffing to develop and or implement State laws governing birds, likely accruing benefits for States. Therefore, this proposed rule

would not have sufficient federalism effects to warrant preparation of a federalism summary impact statement under E.O. 13132.

Civil Justice Reform

In accordance with E.O. 12988, we determine that this proposed rule will not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

Paperwork Reduction Act

This proposed rule does not contain information collection requirements, and a submission to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) is not required. We may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

List of Subjects in 50 CFR Part 10

Exports, Fish, Imports, Law enforcement, Plants, Transportation, Wildlife.

Proposed Regulation Removal

For the reasons described in the preamble, we hereby propose to amend subchapter B of chapter I, title 50 of the Code of Federal Regulations as set forth below:

PART 10—GENERAL PROVISIONS

1. The authority citation for part 10 continues to read as follows:

Authority: 16 U.S.C. 668a–668d, 703–712, 742a–742j–1, 1361–1384, 1401–1407, 1531–1543, 3371–3378; 18 U.S.C. 42; 19 U.S.C. 1202.

2. Remove § 10.14.

Shannon A. Estenoz

*Principal Deputy Assistant Secretary for Fish and Wildlife and Parks,
Exercising the Delegated Authority of the Assistant Secretary for Fish and Wildlife and Parks.*